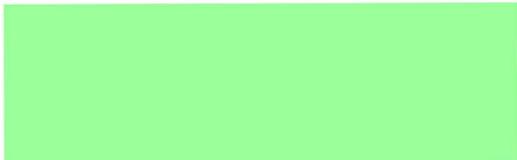


(b)(6)

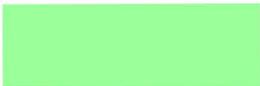
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



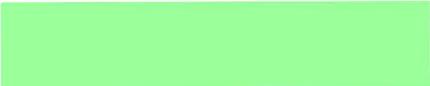
U.S. Citizenship
and Immigration
Services



DATE: OFFICE: VERMONT SERVICE CENTER

FILE: 

JAN 14 2013

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to be "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Vermont Service Center (director). On October 22, 2008, the director revoked the approval of the petition upon notice. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner describes itself as an office furniture manufacturer. It seeks to employ the beneficiary permanently in the United States as a production manager under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).² The petition is accompanied by a certified Form ETA 750, Application for Alien Employment Certification (labor certification), filed by a company named [REDACTED]

The notice of intent to revoke (NOIR) was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out the lack of evidence that a successor-in-interest exists between the petitioner and [REDACTED] and misrepresentations concerning the beneficiary’s marriage, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

The director determined that the marriage fraud bar under section 204(c) of the Act applies to the case and revoked the petition accordingly. The director also concluded that the petitioner failed to establish that it is a successor-in-interest to [REDACTED] the entity that filed the labor certification; and that it possessed the continuing ability pay the proffered wage from the priority date.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

¹ The Form I-140 was originally accompanied by a Form G-28 signed by [REDACTED]. The Massachusetts Board of Bar Overseers suspended [REDACTED] from practice on September 23, 2010. A second Form G-28 was submitted by [REDACTED] with a letter dated October 20, 2010, however this Form G-28 was not signed by a representative of the petitioner. On July 2, 2012, the AAO contacted [REDACTED] in an attempt to obtain a properly executed Form G-28. No response was received. Therefore the petitioner will be treated as self represented.

² Section 203 (b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203 (b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.³

Section 204 of the Act, which governs the procedures for granting immigrant status, states:

Notwithstanding the provisions of subsection (b)⁴ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

According to the evidence in the record of proceeding, the beneficiary of the instant I-140 was also the beneficiary of an I-130 petition filed on January 10, 1997 by his wife, [REDACTED]. Based on this marriage, the I-130 was approved on April 8, 1997 and the beneficiary then filed an I-485 to adjust status on May 15, 1997.

Prior to his marriage to [REDACTED] the beneficiary was married to [REDACTED] in the Dominican Republic. On March 12, 1993, their daughter was born, and on July 24, 1996 the couple divorced. The beneficiary entered the United States in B-2 status on August 6, 1996, met [REDACTED] a short time later, and they were married on December 23, 1996. Following the denial of his I-485, the beneficiary returned to the Dominican Republic in 1998 where he rejoined his ex-wife and daughter. He returned to the United States in 2000 accompanied by [REDACTED] and their daughter. The beneficiary divorced [REDACTED] on March 26, 2001 and

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated in to the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

re-married [REDACTED] on September 16, 2004. The instant I-140 petition was filed on March 21, 2005.

Based on these facts, the director concluded that the beneficiary's marriage to [REDACTED] was entered into for the purpose of evading the immigration laws and therefore the petition could not be approved pursuant to Section 204(c) of the Act. The director's decision summarized the facts of the case and detailed the multiple inconsistencies the beneficiary and his former spouse provided in the I-485 marriage interview.

On appeal, the petitioner submitted an affidavit from the beneficiary in which he states that his marriage to [REDACTED] was not entered into in an attempt to circumvent immigration laws. He claims that he ended the marriage because he discovered that [REDACTED] used and sold drugs. He further testified that he was depressed after his divorce and returned to the Dominican Republic where he rekindled his relationship with his former spouse.

The documentation in the record provides substantial and probative evidence to support a conclusion that the beneficiary attempted to enter into a prior marriage for the purpose of evading immigration laws. There is sufficient evidence that the beneficiary attempted to evade the immigration laws by marrying [REDACTED] and applying for lawful permanent residence based on that marriage. Other than the beneficiary's affidavit and evidence of his former spouse's arrest in January 17, 1998, the petitioner failed to submit evidence to rebut the director's determination that the beneficiary entered into a fraudulent marriage.

The record contains affidavits from individuals who attest to having knowledge of the marriage between the beneficiary and [REDACTED]. In a notarized statement dated August 28, 2008, [REDACTED] of West New York, New Jersey stated she "maintained a very close relationship" with the couple. An affidavit signed by [REDACTED] New Jersey and dated December 11, 2008, states the affiant has known the beneficiary and [REDACTED] since their marriage in 1996 and "share[d] parties, celebrations, anniversaries and other special events." A notarized statement from [REDACTED] New Jersey dated December 11, 2008, states:

I have known [REDACTED] or more than ten years. That I consider them very special friends. For me [REDACTED] is an exceptional person on which people can trust and always find a helping hand. He has always being [sic] a hard working person, honest to all, responsible and loving to his wife.

The record also contains a notarized statement dated December 11, 2008, signed by [REDACTED] New Jersey which states she has known the beneficiary and [REDACTED] since 1996 and that "they used to share with my family and me special events such as Birthdays and Holidays." All of the affidavits were dated in late 2008, more than seven years after the couple divorced. The statements did not contain specific examples of how the affiants were

made aware that the marriage was genuine or explain how each affiant knew the couple. None of the affidavits mentioned the couple's divorce, [REDACTED] arrest on drug charges or the beneficiary's current marriage to his first spouse.

The record contains evidence that the beneficiary and [REDACTED] were interviewed on January 21, 1998 in connection with a Form I-485, Application to Register Lawful Permanent Residence or Adjust Status filed following the approval of a Form I-130, Petition for Alien Relative. As a result of the interview, at which the beneficiary and [REDACTED] gave divergent answers to several interview questions concerning their relationship and living arrangements, the Form I-130 was revoked and the Form I-485 was denied pursuant to 8 C.F.R. § 204.1(d)(2).

Therefore, based on an examination of all of the evidence in the record of proceeding, the director's determination that the beneficiary sought to obtain lawful permanent residence based on a marriage entered into for the purpose of evading the immigration laws is affirmed.

The director's denial also concluded that the petition could not be approved because the employer that filed the labor certification was [REDACTED] a different entity than the petitioner. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

The petitioner also submitted a statement signed by [REDACTED] as former General Manager of [REDACTED] which states:

"On November 8, 2004, [as] General Manager of [REDACTED] I transferred the Rights, Title and Interest of certain assets of [REDACTED] Inc. to [REDACTED]. In this transfer of Assets were a Labor Certification Dated September 24, 2002, Case Number [REDACTED] Priority date October 4, 2008."

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets or asset transaction, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007)

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or the relevant parts of, the predecessor entity. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it can establish eligibility for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also acquired the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area, and the successor's essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482.

In this case, the petitioner has not established that it acquired the predecessor's essential business functions, but rather, as described by [REDACTED] above "transferred...certain assets". Therefore, the petitioner has not established a valid successor relationship for immigration purposes. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification. Because the petitioner failed to establish it is the successor-in-interest to the entity that filed the labor certification, this filing was not accompanied by a labor certification as required by 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) and was therefore not properly filed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.